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ABSTRACT

In the Rene v. Reed case, Meghan Rene and other disabled students argued that their due process rights were violated in regard to the Indiana Statewide Testing for Educational Progress (ISTEP) graduation examination. This set of four lesson plans uses the case of Rene v. Reed, which was first argued before the Indiana Supreme Court, to study the constitutional requirement for due process of law. The lesson plans are entitled: (1) "What Is 'Due Process' Anyway?"; (2) "What Is the Difference between Procedural and Substantive Due Process?"; (3) "The Changing Meaning of 'Due Process'"; and (4) "Oral Arguments On-Line." Each lesson presents background information; states learning objectives; lists online resources; provides learning activities; suggests materials for further study; and addresses related Indiana social studies standards. The lesson plan contains a glossary; a case summary; the Appellant's Petition to Transfer; the Appellee's Opposition to Petition to Transfer; the "Order Denying Transfer"; and the Court of Appeals' Opinion. (BT)

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COURTS in the Classroom

Curriculum Concepts and Other Information on Indiana's Courts for the K-12 Educator

Meghan Rene, et al., v. Dr. Suellen Reed, et al.

"Due Process"

Lesson plans for secondary school teachers on the constitutional requirement for "due process of law."

2002

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Lesson 1: What is "Due Process" Anyway?

A lesson plan for secondary teachers on the constitutional requirement for "due process of law."*

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Background:

This lesson is based on the case of *Rene v. Reed*. A case summary, the appellant's (Rene's) petition to transfer, the appellee's (Reed's) opposition to the petition to transfer, the Court of Appeals opinion and the one-hour webcast of the January 30, 2002 oral argument before the Indiana Supreme Court are all available on-line at http://www.in.gov/judiciary/education/cotm.html. Copies of the written documents are also a part of this lesson plan.

A separate lesson, giving an overview of the structure of Indiana's court system, is also available to provide students with general information about how Indiana courts work. It can be found on the "Courts in the Classroom" homepage at http://www.in.gov/judiciary/education/.

A glossary of legal terms used in this and other Courts in the Classroom lesson plans is attached and is available on-line as well at http://www.in/gov/judiciary/education/glossary.html

Learning Objectives:

At the end of this lesson students should be able to:

1. Understand the legal term " due process of law" and its historical origins;
2. Discuss the requirements for "due process of law" in both the U.S. Constitution and the Indiana Constitution and how those rights are similar or different; and
3. Discuss and differentiate between procedural and substantive due process.

On-line Resources

General Resources:

U.S. Constitution [http://lcweb2.loc.gov/const/const.html]
Bill of Rights [http://lcweb2.loc.gov/const/bor.html]
Indiana Constitution [http://www.in.gov/legislative/ic/code/const.html]

This lesson plan was written by Elizabeth R. Osborn, Special Assistant to the Chief Justice for Court History and Public Education. If you have any questions about this lesson, or ORAL ARGUMENTS ONLINE, feel free to contact her at (317) 233-8682 or cosborn@courts.state.in.us.

Due Process-Related Resources:

www.FindLaw.com is an useful Internet resource for anyone interested in legal issues. It has several pages dedicated to information about due process. Findlaw's basic definition and brief history of the clause are a useful starting point for this lesson.

The National Archives [http://www.archives.gov/] site contains a very helpful essay detailing the importance of the Magna Carta in the development of American law.

The 1215 version of the Magna Carta, found at http://vi.uh.edu/pages/bob/elhone/Magna.html, gives a one-paragraph summary of King John's reign and provides suggestions to guide student reading.

The Avalon Project [http://www.yale.edu/lawweb/avalon/medieval/magframe.htm] of the Yale Law School divides its screen on the Magna Carta into several sections so that students can read the text and definitions of difficult terms at the same time.

Learning Activities:

1. In a brainstorming session (or any similar type activity) session, ask students to define the legal term "due process." If they have trouble with this (which is likely) ask them to use the phrase in a sentence, or to give an example of "due process" in action. The idea of "due process of law" is a much-heralded part of the American legal system. Yet, it evades simple definition. Following this discussion, ask students to look up the definition of "due process." A legal dictionary like the one at www.Findlaw.com might be a good place to start in addition to a textbook, a conventional dictionary or an encyclopedia.

2. Legal scholars trace the history of the due process clause found in the U.S. Constitution and individual state constitutions back to Chapter 39 of the Magna Carta (1215). Divide your students into several groups. Assign each group a particular chapter of the Magna Carta [http://www.historyplace.com/specials/calendar/docs-pix/june-magna-carta.htm] to summarize for the class (each chapter is generally only one or two sentences). This document is readily available in printed texts and on the Internet.

    - Discuss the overall objectives of this document.
    - What types of issues did it expressly address?
    - How did it change the legal relationship between the British monarch and his subjects?

The idea that the monarch does not have unlimited power over his subjects is extremely important in understanding the actions of North American colonists leading up to the Revolution and in the creation of their state and federal constitutions.

3. Ask other groups to research early American state constitutions for references to "due process of law" or "law of the land." The Maryland (1776)

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[http://www.mdarchives.state.md.us/msa/speccol/sc2200/sc2221/000004/000003/html/0000.html], Virginia (1776) [http://www.yale.edu/lawweb/avalon/states/va05.htm], and New York (1777) [http://www.yale.edu/lawweb/avalon/states/ny01.htm] constitutions all contain these phrases. Ask students to think about why Americans were so eager to have these, and a multitude of other protections, written into their constitutions. Remind them of British actions leading up to the Revolutionary War.

4. Ask students to examine the U.S. Constitution and the Bill of Rights (particularly Amendments 5 and 14) for any mention of the requirement for "due process of law." Ask another group of students to examine the Indiana Constitution (particularly Article I, sections 12 and 23) for comparable terms. Ask them to think about any similarities and differences in their findings.

For Further Study

1. In the *Rene v. Reed* case, Meghan Rene and other disabled students argued that their "due process" rights have been violated in regard to the Indiana ISTEP graduation exam. Ask your students to read the petition-to-transfer briefs from both Rene and Reed. The action was brought against Dr. Reed in her capacity as the State Superintendent of Public Instruction. Ask the students to summarize Rene's arguments about why her rights were violated and Reed's arguments about why they were not.

   Make sure your students see that there are two separate arguments being made:
   - The amount of notice given about the new graduation requirements, and
   - The different treatment of disabled versus non-disabled students.

Note: Rene's brief argues that both their procedural and substantive due process rights were violated. The difference between substantive and procedural due process will be the focus of Lesson Two in this unit. This activity makes an excellent transition to that lesson, or, if both lessons will not be completed, a way to concisely teach about the distinctions between procedural and substantive due process. See Lesson Two for suggested on-line resources on this topic.

2. The Supreme Court denied Meghan Rene's petition to transfer. The opinion of the Court of Appeals stands and the appeal is at an end. Ask your students to read the opinion of the Court of Appeals in *Rene v. Reed*.
   - In its written opinion, the court first summarizes the facts of the case, and then addresses each point raised by the two sides.
   - What reasons does the court give for deciding in favor of Reed?
   - What remedy does the court say students are entitled to in the event they fail the exam? Is the state offering this remedy?

Related Indiana Social Studies Standards

U.S. Government.1.13: Examine fundamental documents in the American political tradition to identify key ideas regarding limited government and individual rights.

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Examples: Magna Carta (1215), Virginia Declaration of Rights (1776), the United States Constitution (1787), Bill of Rights (1791) and the Indiana Constitutions of 1816 and 1851

U.S. Government.2.3: Identify and explain elements of the social contract and natural rights theories in United States founding-era documents.

U.S. Government.3.15: Compare core documents associated with the protection of individual rights, including the Northwest Ordinance, the Bill of Rights, the Fourteenth Amendment to the United States Constitution, and Article I of the Indiana Constitution.

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Lesson 2: What is the difference between Procedural and Substantive Due Process?

A lesson plan for secondary teachers on the constitutional requirement for "due process of law."*

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Background:

This lesson is based on the case of *Rene v. Reed*. A case summary, the appellant's (Rene's) petition to transfer, the appellee's (Reed's) opposition to the petition to transfer, the Court of Appeals opinion and the one-hour webcast of the January 30, 2002 oral argument before the Indiana Supreme Court are all available on-line at http://www.in.gov/judiciary/education/cotm.html.

A separate lesson, giving an overview of the structure of Indiana's court system, is also available to provide students with general information about how Indiana courts work. It can be found on the "Courts in the Classroom" homepage at http://www.in.gov/judiciary/education/.

Learning Objectives:

At the end of this lesson students should be able to:

1. Discuss and differentiate between procedural and substantive due process;
2. Identify and discuss due process issues in print and electronic media; and
3. Identify and discuss Indiana, or national, cases involving students and due process issues.

On-line Resources

General Resources:

- U.S. Constitution [http://lcweb2.loc.gov/const/const.html]
- Bill of Rights [http://lcweb2.loc.gov/const/bor.html]
- Indiana Constitution [http://www.in.gov/legislative/ic/code/const.html]

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Due Process Related Resources:

- West Legal Dictionary [http://www.wld.com/conbus/weal/wdueproc.htm]
- A University of Missouri-Kansas City website [http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/dueprocesstudents.htm] contains a brief discussion of due process as it pertains to student issues, and includes links to key student-related Supreme Court decisions.
- The U.S. Department of Education, Office for Civil Rights [http://www.ed.gov/offices/OCR/testing/index1.html], has archived a document that discusses some of the legal issues surrounding student testing. Chapter 2, Legal Principles, and the Glossary of Legal Terms are particularly helpful.

Learning Activities:

Note: If you completed Lesson 1 of this unit, you might modify Activity 1 to act as a review of key terms already covered.

1. In a brainstorming session (or any similar type activity), ask students to define the legal term "due process." If they have trouble with this (which is likely) ask them to use the phrase in a sentence, or to give an example of "due process" in action. Following this discussion, ask students to look up the definition of "due process." A legal dictionary like the one at www.Findlaw.com might be a good place to start in addition to a textbook, a conventional dictionary, an encyclopedia or one of the on-line resources provided above.

2. Using local newspapers (many papers have companion websites as well as their print editions), national news magazines such as *Time* and *Newsweek*, or electronic media sites such as www.cnn.com and www.msnbc.com ask students to search for articles relating to due process. Once several articles have been located, have students read them carefully looking for mention of due process. They should find references to claims about violations of both procedural and substantive due process rights. How do the two differ?

3. Send your students back to whatever source you used to define due process initially (see Activity 1 above) to look for a detailed discussion of the difference between substantive and procedural due process. Ask students to create hypothetical situations within their own school or community illustrating due process procedures. A student or employee handbook is a good resource. The American Civil Liberty's Union has a wide-ranging student section on their web page. Ms. Sybil Liberty's use of a hypothetical student suspension case [http://www.aclu.org/students/slfair.html] to discuss due process is just one of many student-related legal issues at the site.

4. In *Rene v. Reed,* Meghan Rene and other disabled Indiana students argue that both their procedural and substantive due process rights were violated in regard to the Indiana ISTEP graduation exam. Ask your students to read the petition-to-transfer briefs from both Rene and Reed. The action was brought against Dr. Suellen Reed in her capacity as the Indiana Superintendent of Public Instruction. Ask the students to summarize Rene's arguments about why her rights were violated and Reed's arguments about why they were not.

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Make sure your students see that there are two separate arguments being made:

- The amount of notice given about the new graduation requirements, and
- The different treatment of disabled versus non-disabled students.

How did the Court of Appeals respond to the due process arguments in their published opinion?

5. In another student-related case heard by the Indiana Court of Appeals, *Hines v. Caston School Corp,* a male elementary school student who was not allowed to wear an earring to school argued that his due process rights were being violated *because the earring restriction did not apply to female students.*

Ask your class to read the Court of Appeals opinion in *Hines*. In this case the court of appeals panel did not agree in their interpretation of the alleged due process violation. There is, therefore, both a majority [http://www.in.gov/judiciary/education/supp/hines_opinion.pdf] and a dissenting [http://www.in.gov/judiciary/education/supp/hines_dissenting.pdf]opinion. As a class discuss the court's differences on this case, and compare these arguments with those made in *Reed.*

For Further Study

1. Student's due process rights have been discussed by U.S. Supreme Court is several prominent cases. While the Court acknowledges that students have certain protected rights within a school setting, it has held that those rights do have some limitations.

    - Divide your class into several groups. Assign one group to look for U.S. Supreme Court cases involving student's due process rights. The University of Missouri site is quite helpful for locating national cases.
    - In *Rene* the Court of Appeals references several similar cases from states around the nation. Assign small groups of students to gather information from opinions in other states on this issue. Some suggestions:
      Illinois: *Brookhart v. Illinois State Bd. Of Educ.* 697 F. 2d 179 (5th Cir. 1981)
      Florida: *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981)
      Texas: *Crump v. Gilmer Indep. Sch. Dist.*, 797 F. Supp. 552 (ED Tex. 1992);
      New York: *Board of Educ. v. Ambach*, 458 N.Y.S.2d 680, (N.Y. App. Div. 1982)

*These cases can be researched using a search engine such as www.Google.com. Simply search using the case name or citation enclosed by quotation marks (ex: "697 F. 2d 179").

2. Have students' display/discuss the similarities and differences found in the cases they read from the U.S. Supreme Court, the *Rene* opinion, and those from other state courts. Provide each group with a piece of poster board, an overhead transparency, or a section of a display board on which to present their findings.

3. Invite a speaker to come to your class and discuss due process and related topics. Your local bar association or an area chapter of the American Civil Liberties Union (ACLU) might have a list of potential speakers.

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Related Indiana Social Studies Standards

U.S. Government.1.13: Examine fundamental documents in the American political tradition..., the United States Constitution,...the Indiana Constitutions of 1816 and 1851 to identify key ideas regarding the nature of limited government and the protection of individual rights.

U.S. Government.3.15: Compare core documents associated with the protection of individual rights, including the Northwest Ordinance, the Bill of Rights, the Fourteenth Amendment to the United States Constitution, and Article I of the Indiana Constitution.

U.S. Government.4.11: Use a variety of information sources, including electronic media, to gather information about the impact of American ides about democracy and individual rights in other areas of the world.

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Lesson 3: The Changing Meaning of "Due Process"

A lesson plan for secondary teachers on the constitutional requirement for "due process of law."*

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A glossary of legal terms used in this and other Courts in the Classroom lesson plans is attached and is available on-line as well at http://www.in.gov/judiciary/education/glossary.html

Learning Objectives:

At the end of this lesson students should be able to:

1. Discuss the different application of due process stemming from the 5th and 14th Amendments to the U.S. Constitution;
2. Explore the changing interpretation of due process from the Civil War to the present; and
3. Use classroom, library and/or Internet resources to research current press coverage of due process issues.

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- Indiana Constitution http://www.in.gov/legislative/ic/code/const.html

Due Process Related Resources:

- West Legal Dictionary http://www.wld.com/conbus/weal/wdueproc.htm
- Analysis and Interpretation: http://www.access.gpo.gov/congress/senate/constitution/ Annotations of Cases Decided by the Supreme Court of the United States (PREPARED BY THE CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS) is a lengthy document sponsored by the U.S. Senate. Students can search it by topic. Search using terms such as "history of due process," and you will find places within the document that discuss the changing nature of due process.
- Touro College Law Center http://www.tourolaw.edu/patch/ : This site offers excellent summaries and the complete texts for dozens of landmark U.S. Supreme Court decisions.

Learning Activities:

(Note: Lesson 1 and Lesson 2 of this curriculum unit discussed the definition of due process, and the differences between procedural and substantive due process. If students are unfamiliar with these terms, it might be useful to utilize selected parts of the earlier lessons.)

1. Although "due process" is a common expression, it is a difficult term for most people, not just high school students, to define. To complicate matters more, the meaning of "due process" has changed over the course of American history. So, it should be of comfort to your students that judges haven't always agreed on what it means either.

The 5th and 14th Amendments assure Americans that they cannot be deprived of their rights to "life, liberty, or property, without due process of law." Life, liberty, and property are fundamental rights. The authors of the Bill of Rights believed that additional rights, such as freedom of speech and assembly, needed to be specifically protected in the Constitution as well.

- Review the 14th Amendment to the U.S. Constitution and the Bill of Rights (particularly the 4th, 5th, 6th, and 8th Amendments) and the Indiana Constitution (particularly Article I, sections 12 and 23) for any mention of the requirement for "due process of law."

2. In 1873 a major review of what was meant by "due process" and "equal protection" in the U.S. Constitution occurred when a group of New Orleans butchers challenged their city's efforts to regulate the slaughtering of animals. The *Slaughterhouse Cases* 16 Wall 36 (1873) established the legal landscape of due process interpretation for the next 70 years.

Divide your students into four groups to read the four opinions in the *Slaughterhouse Cases* [http://www.tourolaw.edu/patch/Slaughterhouse/] . Assign one group to read the majority opinion, written by Justice Samuel F. Miller, and members of the three other groups to read the three different dissenting opinions written by Justices Field, Bradley, and Swayne. There are several key points you will want to make sure your students can discuss surrounding this case.

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- The majority opinion found that the Louisiana law did not violate the 14th Amendment by limiting the rights of the butchers to work in their trade. It further established that the 14th Amendment should be only very narrowly applied to the States, and that it (and the other rights protected in the Bill of Rights) were drafted to protect the people from the oppression of national government—not their state governments. Finally, Justice Miller states that the Civil War Amendments (13th, 14th, and 15th Amendments) were intended only to protect black freemen.

- The three dissenting opinions contend that access to a profession is a fundamental right protected by the 14th Amendment, and that the 14th Amendment protects the rights of *all* citizens, not just blacks. Justice Swayne emphasizes that the 14th Amendment's purpose was to provide the national government with a means of assuring that the States did not violate the fundamental rights of any citizen.

These opinion will not be easy for students to read. A teacher might choose to print out and distribute only excerpted sections of each opinion or to go through and underline or otherwise emphasize key sections of the opinions.

3. Study of the U.S. Supreme Court's *Slaughterhouse Cases* (1873) demonstrates how the Court is often strongly divided over major Constitutional issues. *Slaughterhouse* was a 5-4 decision, and although the majority opinion controlled, the minority was very outspoken in its disagreement. This division remained evident as the court reviewed 14th Amendment's application over the next 100 years.

Beginning in the early 1900s, the Supreme Court's conception of "due process" slowly changes. Until 1936, the Court consistently declared state laws that tried to control working conditions and wages unconstitutional—a violation of the due process clause. Despite these prior decisions, Elsie Parrish decided to sue her employer for violating Washington State's minimum wage law. At the time Parrish was earning $12 a week as a hotel maid where she worked about 48 hours a week.

In *West Coast Hotel Co. v. Parrish* 300 U.S. 379 (1937) [http://www.agh-attorneys.com/4_west_coast_hotel_v_parrish.htm], another 5-4 decision, the Court reversed its earlier position and upheld the Washington state minimum wage law. The 14th Amendment now protected the rights of workers. State regulations were not considered oppressive and interfering with an individual's right to work, but rather as a protection against exploitive employers.

- Depending on individual time constraints, teachers may either assign students to read the majority and dissenting opinions in *West Coast Hotel* or briefly summarize the Court's opinion for the class.
- Ask students to compare the Court's views of labor in *Slaughterhouse* and *West Coast Hotel* cases. Is the right to work a fundamental right? What constitutes appropriate interference? Whether or not the state can intervene in the relations between employer and employee, to protect the best interest of the employee, is at the heart of the Court's mid-century reinterpretation of the due process clause of the 5th and 14th Amendments.

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- As in the *Slaughterhouse Cases*, emphasize that the entire Court did not embrace these changes; nor did the business community. The application of the 14th Amendment to the states faced substantial criticism.

By the end of the twentieth century, of a person's due process rights had expanded considerably. Most of us assume that freedom of the press, freedom of religion, and so forth applied equally to both the state and federal governments. This has not always been the case. Prior to the passage of the 14th Amendment, the Court consistently ruled that the Bill of Rights applied only to the federal government. Beginning in the early 1900s, the Court issued opinions directing that neither the federal or state governments could abridge some of the guarantees of the Bill of Rights.

The Court was especially active in the 1960s in its extension of the14th Amendment's due process clause to protect the civil rights of minority groups such as women and African-Americans. This new interpretation of the 14th Amendment is sometimes referred to as the "due process revolution."

- Many of the Court's decisions, expanding constitutional protections, are today considered "landmarks," and their names are familiar to many of us. Ask your students to identify what individual rights are the focuses of the following cases:

  Near v. Minnesota 283 U.S. 697 (1931) freedom of the press
  http://usinfo.state.gov/usa/infousa/facts/democrac/45.htm
  Stromberg v. California 283 U.S. 359 (1931) freedom of speech
  http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/historic/query=%5Bgroup+f_flag+desecration!3A%5D/doc/%7Bt15441%7D/hit_headings/words=4/pageitems=%7Bbody%7D
  Mapp v. Ohio 367 U.S. 643 (1949) search and seizure
  http://www.tourolaw.edu/patch/Mapp/
  Gideon v. Wainwright 372 U.S. 335 (1963) right to counsel
  http://www.tourolaw.edu/patch/Gideon/
  Miranda v. Arizona 384 U.S. 436 (1966) reading your rights
  http://www.tourolaw.edu/patch/Miranda/

- Using recent magazines, newspapers, or the Internet, ask students to research current discussion about the Court's interpretation of due process. For instance, many police agencies believe the courts have granted more rights to criminals instead of victims, and in the process made policing much more difficult.

For Further Study
Beginning with the information gathered in this lesson, ask students to conduct an historical research project surrounding the interpretation of "due process." Students might compare the Court's interpretation of due process doctrine in several eras or focus on a particular era, justice, or case.

This lesson plan was written by Elizabeth R. Osborn, Special Assistant to the Chief Justice for Court History and Public Education. If you have any questions about this lesson, or ORAL ARGUMENTS ONLINE, feel free to contact her at (317) 233-8682 or eosborn@courts.state.in.us.

Related Indiana Social Studies Standards

U.S. Government 5.3: Describe the political, personal, and economic rights of citizens embedded in the United States Constitution and in constitutional law developed through decisions of the United States Supreme Court.

U.S. Government 5.8: Analyze and evaluate decisions about rights of individuals in landmark cases of the United States Supreme Court, such as *Whitney v. California* (1927), *Stromberg v. California* (1931), *Near v. Minnesota* (1931)....

U.S. History 4.8: Evaluate the constitutional significance of the following landmark decisions of the United States Supreme Court: *Gitlow v. New York* (1925), *Stromberg v. California* (1931), *Near v. Minnesota* (1931), *Schechter v. United States* (1935), *West Coast Hotel v. Parrish* (1937).

U.S. History 9.1: Locate and analyze primary and secondary sources presenting differing perspectives on events and issues of the past.

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COURTS in the Classroom

Curriculum Concepts and Other Resources on Indiana's Courts for the K-12 Educator

www.IN.gov/judiciary/education/

Meghan Rene, et al., v. Dr. Suellen Reed, et al.

Lesson 4: Oral Arguments On-Line

A lesson plan for secondary teachers on conducting mock oral arguments *

*The staff of the judicial branch chose this case as a useful tool to teach an interesting aspect of the law. Its selection has no bearing on how the case will ultimately be decided. Since the members of the Court did not participate in the preparation of the lesson plan; the issues raised in it will not necessarily be addressed in the oral argument.

Background:

This lesson is based on the case of *Rene v. Reed*. A case summary, the appellant's (Rene's) petition to transfer, the appellee's (Reed's) opposition to the petition to transfer, the Court of Appeals opinion and the one-hour webcast of the January 30, 2002 oral argument before the Indiana Supreme Court are all available on-line at http://www.in.gov/judiciary/education/cotm.html.

A separate lesson, giving an overview of the structure of Indiana's court system, is also available to provide students with general information about how Indiana courts work. It can be found on the "Courts in the Classroom" homepage at http://www.in.gov/judiciary/education/.

A glossary of legal terms used in this and other Courts in the Classroom lesson plans is attached and is available on-line as well at http://www.in/gov/judiciary/education/glossary.html

Learning Objectives:

At the end of this lesson students should be able to:

1. Conduct a mock oral argument (handout on Oral Arguments is attached) based on briefs provided and further research as assigned by the instructor;
2. Articulate and differentiate between the arguments made by opposing counsel in an oral argument; and
3. Write an opinion for the case outlining why one legal argument prevailed over the other based on their reading, research, and viewing of the oral argument.

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Learning Activities:
Note: The order of these activities is arbitrary. A teacher might decide to have his or her class watch the oral argument first, and then conduct a mock hearing, or vice versa. In the event that you would like students to watch another oral argument to remain unbiased about this case's content, please return to the main Courts in the Classroom website at www.IN.gov/judiciary/education.index.html to select an appropriate case.

1. Teachers should ask their students to read the case briefs and the case summary for *Rene v. Reed.* Divide the class into several groups: the appellant (Meghan Rene), the appellee (Dr. Suellen Reed, Superintendent of Public Instruction), and the court officers (a sheriff, a timer, and a panel of five justices). Each group will be assigned the task of preparing for a different part of the oral argument.

2. Students can use the information they gathered in Activity 1 in order to conduct a mock oral argument. (The information provided in the October 2001 Case of the Month: Lesson 1 might be helpful for this exercise as well). Those assigned to act as judges should read the briefs and research the cases the attorneys rely on most heavily in the briefs. (Recent Indiana court opinions can be accessed online at http://www.in.gov/judiciary/opinions/archive.html Libraries that carry the Indiana Cases volumes will have all Indiana cases.) Student judges might also prepare questions to ask the attorneys. Those acting as attorneys (and their law clerks) should prepare an argument for the court. A judge may interrupt at any time with a question. Some judges are very active questioners, as exemplified by the panel in the *Rene* case.

3. Watch the oral argument in the case of *Rene v. Reed.* Students should take notes on the arguments made by each attorney. How well did they present the information outlined in their briefs? Have they presented any new arguments? Did the justices ask many questions? How would you characterize their questions? What issues did the justices seem particularly interested in pursuing?

4. After watching the *Rene* oral argument, and/or conducting your own mock argument, ask students to write an opinion for the case. You may ask them to write a majority opinion, a concurring opinion, or a dissent. Make sure the students address the specific legal argument under discussion. They should not give their feelings about the case. Instead, they should come to a conclusion based on the facts presented and legal precedents. Recent and current Indiana Supreme Court and Court of Appeals opinions [http://www.in.gov/judiciary/opinions/search.html] are archived on the judiciary website if you wish to provide your students with sample opinions.

5. The Court denied Rene's petition to transfer, therefore the appeal is at an end. After asking students to come up with their own opinions, ask them to read the opinion of the Court of Appeals. Talk about how their opinions and the Court's differed.

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For Further Study

The Indiana Supreme Court, the Court of Appeals, and the Tax Court hear oral arguments regularly. Teachers might consider bringing a class to tour the State House and to watch an oral argument. To arrange a special tour of the courtroom or to check on upcoming oral arguments please contact Elizabeth Osborn at (317) 233-8682 or eosborn@courts.state.in.us. Guided tours of the State House can be arranged through the tour office at (317) 233-5293 or captours@idoa.state.in.us.

The legal links menu [http://www.in.gov/judiciary/research/links.html] on the Judicial System's homepage provides a wide variety of resources for students and teachers. From this site teachers can link to opinions handed down by Indiana and federal courts, publications and contact information for local and national bar associations, Indiana law schools, and other sites containing legal resources.

If you are interested in viewing an oral argument from another state Supreme Court consider visiting Florida's court website at [http://www.flcourts.org/]

Related Indiana Social Studies Standards

U.S. Government.5.13: Practice civic skills and dispositions by participating in a group of activities such as simulated public hearings, mock trials, and debates.

U.S. Government.3.6: Explain the functions of the courts of law in governments of the United States and the state of Indiana with emphasis on the principles of judicial review and an independent judiciary.

U.S. Government.1.13: Examine fundamental documents in the American political tradition..., the United States Constitution,...the Indiana Constitutions of 1816 and 1851 to identify key ideas regarding the nature of limited government and the protection of individual rights.

This lesson plan was written by Elizabeth R. Osborn, Special Assistant to the Chief Justice for Court History and Public Education. If you have any questions about this lesson, or ORAL ARGUMENTS ONLINE, feel free to contact her at (317) 233-8682 or eosborn@courts.state.in.us.

Oral Arguments

Very often, the Court of Appeals and/or Supreme Court will decide the case based on written briefs and the trial record alone. In some cases, however, the courts will hear oral argument as well. In oral argument, each party generally has thirty minutes to explain its position and answer the judges' questions. The appellant goes first, and may reserve some of the allotted time to present a rebuttal after the appellee speaks.

A court may grant oral argument for any of a number of reasons, such a

- The case is particularly complex, and a face-to-face presentation can help clarify the issues.
- A brief is unclear, and the court wants to make sure it understands the arguments being raised.
- The implications of the case are very broad, and the court wants to explore how this decision might affect future cases.
- In reading the briefs, questions came to the judges' minds that the parties did not address, and the court wants an opportunity to hear their answers to those questions.

The Indiana Supreme Court may, as in the case of Rene v. Reed, schedule oral argument before deciding whether to grant transfer in a case. This allows the court to engage in give-and-take directly with the parties' attorneys, with the justices directing the focus to points they consider particularly significant, interesting, or troublesome. The court can then make a better-informed decision as to whether this case presents issues they should consider.

Glossary

Alternative Dispute Resolution: a way to settle a case without going to court; sometimes ADR is court ordered. Mediation and arbitration are examples of alternative dispute resolution.

Appeal: a proceeding undertaken by one of the parties in a lawsuit asking to have a decision reconsidered by a higher court or agency.

Appellant: the party who brings the appeal; usually the person who is unhappy with the lower court's decision.

Appellee: the person against whom the appeal is lodged; usually wants the lower court's decision to be upheld.

Bench Trial: a trial in which there is no jury and the judge decides the case.

Civil Suit: a case relating to private rights and remedies that are sought in court. Separate from criminal cases.

Compensatory damages: damages that are awarded to compensate an injured person for the actual (proven) injury or loss. Punitive damages are awarded in addition to actual damages when the intent is to punish the guilty party for an action.

Concurring opinion: an appellate court opinion that agrees with the vote (opinion) of the majority, but for a different reason. The concurring justice(s) write a separate opinion explaining how they reached their decision.

Criminal: a case in connection with the commission of a crime.

Defendant: the person who is charged with a crime (criminal case) or against whom damages are sought (civil case).

Denial of transfer: the court's refusal to grant a request for a motion or petition to "transfer" or take a case from a lower court.

De novo: to begin anew; for example, to have a new trial.

Dissenting opinion: an opinion written by one or more judges who disagree with the majority.

Direct appeal: a case that, if appealed, moves directly from the trial court to the supreme court; it bypasses intermediate appellate courts.

Effective January 1, 2001 the court must take on direct appeal death penalty cases, and they have chosen to allow direct appeals if the sentence was life without parole.

Grand Jury: a group of citizens who decide whether or not there is enough evidence to charge a suspect with a crime.

Interlocutory appeal: an appeal that occurs in the course of a trial; it is made before the trial court reaches a decision. During the interlocutory appeal, the trial is placed on hold so to speak.

Jury: a group of citizens chosen to hear a case and render a verdict based on the facts presented to them. Sometimes referred to as a "petit jury."

Jury Trial: often referred to as "trial by jury," this is a trial in which a jury tries the facts.

Note: The U.S. and Indiana Constitution's are not identical on this issue. The Indiana Constitution (Article 1 section 19) provides for a trial by jury in all criminal cases. Under the U.S. Constitution, however, "The right to a jury trial is established...but it is not an absolute right. The Supreme Court has stated that petty crimes (as those carrying a sentence of up to 6 months) do not require trial by jury. The right to a jury trial in a criminal case may be waived by the ``express and intelligent consent'' of the defendant...There is no right to a jury trial in equity cases. When a civil case involves both legal and equitable issues or procedure, either party may demand a jury trial (and failure to do so is taken as a waiver), but the judge may find that there is no right to jury trial because of equitable issues or claims." [http://www.FindLaw.com/ (choose the legal dictionary)]

Libel: harmful remarks, made in writing, that might injure a person's reputation (could also be in a picture sign, etc.). Slander refers to the same type remarks that are made verbally.

Majority opinion: an opinion that is signed by more then half of the judges considering a case. Sometimes it is called the main opinion.

Medical malpractice: a case involving a doctor's alleged failure to provide care at an acceptable level.

Opinion: a court's written explanation of its decision in a case. Not all opinions, however, are published.

Non-published opinions may be requested by contacting the Clerk's Office at (317) 232-1930. Published opinions for recent Indiana Court

of Appeals and Supreme Court cases can be found online at http://www.in.gov/judiciary/opinions/.

There are different types of opinions issued by the court, see also concurrent, dissenting and majority opinion.

Oral arguments: the presentation of information before an appellate court. Either the appellants or the appellees may request to make oral arguments before the court. The court does not have to agree to hear oral arguments; they may feel that the written record is sufficient. On the other hand, they may request that the representatives of each party present oral arguments.

Peremptory Challenge: a request by an attorney for either side to disqualify a juror; the attorney does not have to give a reason for his request. The number of peremptory challenges varies depending on the kind of case. Attorneys are also allowed to request that a juror be dismissed for cause. In a challenge for cause the attorney argues that the juror would not be able carry out his/her duties for some reason specified by the attorney.

Petition: a formal written request made to a court.

Petition to transfer: a request to the court, asking them to accept jurisdiction over a case.

Petit Jury: *see* jury

Plaintiff: The person who initiates a civil lawsuit.

Post-conviction relief: a request by a prisoner asking the court to nullify, cancel or correct a sentence.

Prosecution: in criminal cases it is the state (government) that initiates the case; they are referred to as the prosecution. In a civil case the person who initiates the case is called the plaintiff.

Punitive damages: punitive damages are awarded in addition to actual damages when the intent is to punish the guilty party for an action. They are generally awarded when it has been determined that the defendant acted with recklessness, malice, or deceit.

Remit: the court's reduction of the damages awarded in a jury trial.

Slander: harmful remarks that might injure a person's reputation that are made verbally. Libel refers to similar remarks that are made in writing, pictures, etc.

Statute of limitations: a legally established time limit (based on the date of the claim for civil cases or the crime for criminal cases) for entering a suit (civil) or beginning a prosecution (criminal). A reasonable time limit is established so that the defendant may still be able to find witnesses, evidence, etc. pertinent to the case.

Summary judgment: a judgment issued by a judge where there is agreement about a set of relevant facts. It is a procedural device that allows for the speedy resolution of some controversies without the need for a trial.

Toll: to stop the running of time, especially regarding time allowed before filing a lawsuit. See, statute of limitations.

Tort: a civil wrong; the remedy that is sought is usually a monetary award for damages

*This glossary is provided to help teachers and students gain a working knowledge of some of the terms used in our lesson plans; it is not intended to be a comprehensive legal dictionary.

The Find Law legal website is an invaluable tool for all people working with the law (http://www.findlaw.com/). The Find Law site includes access to a legal dictionary (http://dictionary.lp.findlaw.com/).

Voir Dire: the act or process of questioning prospective jurors, by the trial counsel or the trial judge, to determine which are qualified for service on a jury.

COURTS in the Classroom

Curriculum Concepts and Other Resources on Indiana's Courts for the K-12 Educator

Case Summary:

Meghan Rene v. Dr. Suellen Reed, et al.

Webcast Oral Argument

A class of special education students sought injunctive and declaratory relief to prevent the State Superintendent of Public Insturction from enforcing a statute requiring them to pass the Indiana Statewide Testing for Educational Progress (ISTEP) graduation examination in order to graduate. The Marion Superior Court ruled in favor of the superintendent. The Court of Appeals affirmed.

Rene v. Reed, 751 N.E.2d 736 (Ind. Ct. App. 2001). The students petition to transfer jurisdiction to the Indiana Supreme Court.

Attorneys for Rene: Kenneth J. Falk, Jacquelyn Bowie Suess, Indianapolis, IN.
Attorneys for Reed: Steve Carter, Attorney General of Indiana, Frances Barrow, Linda S. Leonard, Deputy Attorney General, Indianapolis, IN.

IN THE
INDIANA SUPREME COURT

No. _____

(Court of Appeals No. 49A02-0007-CV-433)

MEGHAN RENE, *et al.*,	)	
	)	APPEAL FROM THE MARION
Appellants (Plaintiffs Below),	)	SUPERIOR COURT, ROOM NO. 12
	)	
v.	)	Cause No. 49D12-9805-CP-370
	)	
DR. SUELLEN REED, *et al.*,	)	HONORABLE SUSAN MACEY
	)	THOMPSON, JUDGE
Appellee (Defendant Below).	)	

PETITION TO TRANSFER

Kenneth J. Falk, No. 6777-49
Jacquelyn Bowie Suess, No. 17241-53A
Indiana Civil Liberties Union
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059

Attorneys for Appellants

Questions Presented on Transfer

1. Were the due process rights of disabled students who were forced to take and pass the graduation qualifying examination (hereinafter "GQE") violated where, even though they received remediation opportunities after they first flunked the test as sophomores, the evidence is undisputed that disabled students were not necessarily taught the building block material necessary to learn what was tested and the evidence is undisputed that even after the GQE requirement went into effect, almost 50% of all learning disabled students still did not have their curriculum realigned to teach what was tested on the examination?

2. Does due process require that the case conferences which generally control the education received by disabled students be given the authority to determine if disabled students should graduate without considering the GQE until such time as the graduation qualifying examination is a fair test of what the disabled students have actually been taught given that it is uncontested that many disabled students did not have adequate curriculum preparation prior to being forced to take the GQE, and given that it is uncontested that it takes learning disabled students more time to learn material?

3. Does the Individuals with Disabilities Education Act (hereinafter "IDEA"), 20 U.S.C. § 1401, *et seq.*, require that disabled students who are prescribed various testing modifications and accommodations by their case conferences be permitted these modifications and accommodations during the GQE?

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PETITION TO TRANSFER

Background and Prior Treatment of Issues on Transfer

Beginning with the class of 2000, in order to receive a diploma, all Indiana public high school students were required to take the GQE and pass it subject to certain waivers. IND. CODE § 20-10.1-16-1.5; IND. CODE § 20-10.1-4.3. Special education students who have been found disabled pursuant to the IDEA are also subject to the GQE requirement. (Slip opinion at 3).

The disabled children in this case filed their class action complaint seeking injunctive and declaratory relief on May 21, 1998 (R. 14). Pursuant to a prior decision of the Court of Appeals, *Rene v. Reed,* 726 N.E.2d 808 (Ind.Ct.App. 2000), the case was eventually certified as a class action with two classes defined as:

Class A:

> All children with disabilities (as defined in *Ind. Code* 20-1-6-1) who have been, are being, or will be required to pass the Indiana Statewide Testing for Education Progress (ISTEP+)[1] test as a condition of receiving a High School Diploma and who, prior to the advent of the ISTEP+ examination were designated as being in the diploma track, but who had, in the past, been excused from standardized testings, and/or whose individualized education plans did not provide that they were to be taught the subjects tested on the ISTEP+ examination.

Class B:

> All children with disabilities (as defined in *Ind. Code* 20-1-6-1) who have been, are being, or will be required to pass the Indiana Statewide Testing for Education Progress (ISTEP+) test as a condition of receiving a High School Diploma and who have, or at the time of taking the ISTEP+ graduation exam had or will have, individualized education plans which exempted them or which will

---

[1]The test is more properly known as the GQE (graduation qualifying examination) and will be referred to in this Brief as the GQE. *See*, *Rene v. Reed*, 726 N.E.2d 808, 813, n. 3 (Ind.Ct.App. 2000).

> exempt them from standardized testing or which allow or which will allow for adaptations and accommodations during testing which are not or will not be honored during the testing.

(R. 1362).

On behalf of the first class the disabled children claimed that due process required both that they be given adequate notice before the GQE requirement went into effect and that they be given adequate exposure to both the material tested on the examination and an opportunity to learn the material. In finding that no due process violation was present, the trial court noted that given that once the test, first given in the sophomore year, is flunked, students have remediation opportunities, it was "implausible that the Plaintiff class was not exposed throughout their high school career to the subjects tested on the GQE." (R. 1375). The trial court did not address the substantial difference in preparation given to non-disabled students compared to that given to disabled students. Indiana law and practice required that the curricula for all non-disabled students be realigned beginning in kindergarten for the class of 2000 in order to teach the building blocks necessary to learn the material tested on the GQE. (Court of Appeals brief of appellants at 6-10; Slip opinion at 11).[2] Yet, it was not until 1997, shortly before the GQE test was first given, that parents and disabled children learned that the GQE test and the proficiencies it tested had to be satisfied for disabled students as well. (Court of Appeals brief of appellants at 10-13). The trial court also did not comment on the uncontested evidence that prior to the GQE, and therefore prior to the giving of remediation, many

---

[2] As is indicated in the disabled students' Court of Appeals brief at pages 6-13, Indiana added the ISTEP program, without the GQE requirement, in 1987. Pursuant to that 1987 law, the State Board of Education was to begin adopting educational proficiencies and achievement standards for grades 1-8. However, disabled students were expressly exempted from these general proficiency standards. When the statute was amended in 1990 to apply to high school students, disabled students were again exempted. Therefore, the curriculum of non-disabled students has been adjusted and aligned to the materials tested on the ISTEP exams, and later the GQE exam, since 1987. Disabled students found out about the requirement in 1997.

disabled students had not been exposed to the basic building block material necessary to learn what was tested on the GQE and that, further, even after the GQE requirement went into effect, approximately 49% of special education directors indicated that learning disabled students had not had adequate curriculum preparation to pass the GQE. (Court of Appeals brief of appellants at 13-17).[3] The trial court also found that even if there had been due process violations, the only remedy due the disabled children was more remediation opportunity, even after the students' class had graduated. (R. 1381).

As far as Class B was concerned, the trial court found that the IDEA was not violated, despite the fact that certain modifications and accommodations established by case conferences and mandated in disabled students' individualized education plans (IEPs) could not be used during the GQE. (R. 1381-82).[4] Chief among the modifications or accommodations which are not honored

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[3] In July of 1999 the Indiana Legislative Services Agency issued a report entitled *The Impact of the ISTEP+ Graduation Qualifying Exam on Students with Learning Disabilities*. (R. 870). It noted that:

> In addition to the lawsuit [*Rene v. Reed*], a survey of directors of special education planning districts suggests that other students with learning disabilities may not have been adequately prepared to take the GQE. Based on a survey of directors of special education planning districts (conducted by the Legislative Services Agency in May of 1999), the directors estimated that approximately 51% of the 10th and 11th grade students with learning disabilities who took the GQE had sufficient curriculum preparation. These results indicate that other students with learning disabilities may be in situations similar to those students who filed the complaint.

(R. 911). This is similar to the conclusions reached in a study of the GQE done by Dr. Genevieve Manset, Ph.D. of Indiana University and Sandra Washburn entitled "Project Exit". (R. 150, 153, 164).

[4] The IEP sets out the blue print of the disabled child's education and must also include testing modifications. 20 U.S.C. § 1414(d). (*See also* Court of Appeals brief of appellants at 4-6).

is the IEP requirement that tests be read to students. (Court of Appeals brief of appellants at 18). Even if the IEP so indicates, the reading comprehension portion of the GQE cannot be read to the student. (*Id.*). Additionally, the following testing accommodations or modifications agreed upon by case conferences and placed into the IEPs are not honored during the GQE:

> -not honoring an IEP which requires that multiple choice tests not contain more than three questions
>
> -not honoring an IEP which requires that a student be provided with color coded prompts
>
> -not honoring an IEP which provides that the language of mathematical story problems be reduced
>
> -not honoring an IEP which provides that a diploma can be awarded without taking the GQE

(*Id.*).

On appeal, in a published decision issued on June 20, 2001, the Court of Appeals affirmed the trial court in all respects. Like the trial court, the Court of Appeals concluded that students had an interest, protected by due process, in the award of a diploma if all the graduation requirements were met. (Slip opinion at 5 -7). The Court of Appeals noted that due process would be violated both if students did not have sufficient notice of the GQE and/or if the examination covered material to which the students had not been exposed. (*Id.* at 7). However, the Court of Appeals found that there was sufficient evidence to support the trial court's determination that the three years notice provided to students and parents was adequate for due process purposes. (*Id.* at 9). The Court of Appeals also concluded that the trial court's finding that disabled students had remediation opportunities beginning in their sophomore years was adequate to support a conclusion that the students had adequate exposure to the information tested on the GQE. (*Id.* at 11-13). The Court of Appeals further noted that the trial court committed no error in concluding that the remediation

offered by the State was an adequate remedy in the event that the GQE requirement did, in fact, violate due process. (*Id.* at 14).

Finally, the Court of Appeals concluded, as did the trial court, that the IDEA was not violated to the extent that the State refused to allow students to use adaptations and modifications on the GQE dictated by their case conferences and IEPs if the State deems the adaptations and modifications to be for " 'cognitive disabilities' that can significantly affect the meaning and interpretation of the test score.'" (*Id.* at 17).

Reasons to Grant Transfer

The Court of Appeals erroneously decided a new and important question of law and has erroneously determined a case of great public importance that should be decided by this Court

I. Introduction

As a result of the Court of Appeals decision more than a thousand students who had been in a position to obtain a high school diploma prior to the advent of the GQE will not receive their diplomas.[5] Their lives have been forever changed, to their detriment. This is undoubtedly a matter of great public import. Moreover, the decision of the Court of Appeals erroneously diminishes the due process rights that all students have in insuring that graduation requirements are not altered in a manner that makes it impossible for them to achieve graduation. It also erroneously, in the first reported judicial decision of its kind in the United States, allows modifications and adaptations prescribed in IEPs to be dispensed with during state wide assessments and in doing so violates the IDEA. Accordingly, transfer should be granted.

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[5] In the class of 2000 alone, approximately 1,162 disabled children who were on the diploma track did not pass the GQE and were not eligible for waivers and therefore did not graduate. (R. 336).

II. The Court of Appeals decision that the disabled students' due process rights were not violated is erroneous since the evidence was uncontested that many of the students were not taught curriculum that was aligned to teach the proficiencies tested on the examination and the remediation opportunities afforded after the testing began were not enough to remedy the lack of alignment through the students' educational lives

The Court of Appeals properly recognized that due process is violated if students are given insufficient notice of a graduation examination requirement and if the students, although provided with adequate notice, are not taught the information tested on the examination. (Slip op. at 7). *See also, Brookhart v. Illinois State Board of Education*, 697 F.2d 179 (7th Cir. 1983); *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981); *Crump v. Gilmer Independent School* District, 797 F.Supp. 552 (E.D.Tex. 1992); *Anderson v. Banks*, 520 F.Supp. 472 (S.D.Ga. 1981), *app. dmd.*, 730 F.2d 644 (11th Cir. 1984). Therefore, the mere fact that the disabled students and their parents were given three years notice, in 1997, that the class of 2000 would have to satisfy the GQE requirement does not resolve the question of whether the GQE satisfied due process. If the General Assembly passed a law in April of 2000 requiring all students to demonstrate a proficiency in Spanish and made it effective with the class graduating in May of 2004, it would be difficult to argue that notice was inadequate, provided that evidence demonstrated that proficiencies could be taught in this four year period. However, if students were never taught the language, this would violate substantive due process since, regardless of how long the requirement was in effect, there is no way that anyone could learn the language and demonstrate proficiency. "When it encroaches upon concepts of justice lying at the basis of our civil and political institutions, the state is obligated to avoid action which is arbitrary and capricious, does not achieve or even frustrates a legitimate state interest, or is fundamentally unfair." *Debra P.*, 644 F.2d at 404.

In finding that there was no substantive due process violation the Court of Appeals relied only on the trial court's factual finding 7 that because a student was afforded remediation

opportunities once he or she flunked the GQE, it was "implausible" that the disabled students were not exposed to the subjects tested on the GQE. (R. 1375). However, both the Court of Appeals and the trial court ignored uncontested evidence which demonstrates that the disabled students simply did not have exposure to the information tested on the GQE in a manner that would provide them a reasonable opportunity to learn the material.

The Court of Appeals recognized that at no time prior to the GQE was any requirement imposed on schools that they align the curricula of disabled students, even those on a diploma track, to a particular criteria. (Slip opinion at 11, *see also,* Court of Appeals brief of appellants at 6-13). But Indiana law specifically provided that non-disabled students had to have their curriculum aligned throughout their education lives from the time they began elementary school, thus assuring exposure to the building blocks which would lead to mastery of the information tested on the GQE. (*Id.*). Inexplicably, the Court of Appeals fails to mention that even after the GQE went into effect, 49% of the special education directors in Indiana believed that learning disabled students had not had sufficient curriculum preparation to pass the GQE. (R. 911).

Education is a process of layering concepts, of placing building block material learned in elementary school on top of new material to achieve mastery of complex high school material. (R. 153). This process takes time and if the curriculum was not aligned to teach the pre-high school concepts in elementary school, the building blocks will not be present in high school so the student can learn the more difficult concepts tested on the GQE. (*Id.*). The educational realignment process therefore takes time and must begin with the lowest grade levels. (R. 106, 153, 212). This is especially true for learning disabled students who learn at a slower pace than their non learning disabled peers. (*Id.*)

None of this is disputed. Although it is true that students who flunked the GQE had

remediation opportunities in their sophomore, junior and senior years, for many disabled students this remediation was provided without the student having adequate curriculum preparation. Providing remediation in this situation is no more "exposure" to the subjects tested on the GQE than claiming that a 4th grader is "exposed" to algebra when she is forced to attend a class without ever having been taught any pre-algebra concepts.

Substantive due process is offended by irrational and unreasonable conduct by the State. *See e.g., Mitchell v. State*, 659 N.E.2d 112, 115-16 (Ind. 1995). Non-disabled students in Indiana were given 12 years to prepare for the GQE. Disabled students in the class of 2000 were given three years. Even after the GQE went into effect, almost one-half of all learning disabled students still had not had their curriculum aligned to the test. This is irrational and arbitrary. Moreover, this due process violation is not mitigated by the fact that at the end of their education careers the disabled students were offered remediation. The evidence is uncontested that this is not a substitute for being taught the information by laying the proper foundation and building on it throughout students' entire educational careers. The Court of Appeals decision erroneously fails to recognize the due process violation.

III. The opportunity for remediation is not an effective remedy for the due process violation

The Court of Appeals held that even if there was a due process violation, it was remedied by the fact that disabled students could be given additional remediation, at least through the age of 21. (Slip opinion at 13- 14, 511 IAC 7-3-49). However, use of the algebra example above quickly demonstrates why additional remediation is not the appropriate remedy. In a situation where the court is faced with a systematic failure of substantive due process, where a large number of students were not taught what was tested, the appropriate remedy is to enjoin the state from requiring the

graduation examination until such time as it is no longer irrational to impose the requirement on the class. Thus, in *Anderson* the court concluded that, since the graduation test policy:

> violates due process, all plaintiffs . . . prevail. Defendants are ordered to award diplomas to all students who would have received them except for the existence of the [graduation test] policy. No exit exam policy may be utilized until it is demonstrated that the test used is a fair test of what is taught.

520 F.Supp. at 512. And, in *Debra P.* the court held "that the State may not deprive its high school seniors of the economic and educational benefits of a high school diploma until it has demonstrated that the (graduation test) . . .is a fair test of that which is taught in the classrooms." 644 F.2d at 408.

The proper remedy in this case is to enjoin the State from enforcing the GQE requirement until such time as it is a fair test of what disabled children have been taught. The case conferences should be entrusted with the responsibility to determine if it is appropriate for a student to take the GQE in order to graduate. If the case conference determines that the student has been adequately exposed to the information throughout his or her educational career the GQE requirement can be used. If not, then the student should be allowed to graduate if he or she meets all other requirements aside from the GQE.

IV. The Court of Appeals erred in holding, in the first reported court decision in the United States on the subject, that the failure of the State to honor certain IEP mandated modifications and adaptations during the GQE did not violate the IDEA

It is undisputed that IEP mandated testing modifications and adaptations which students can use on every test they take in elementary, middle, and high school are not allowed by the State during the GQE, the most important test the students will ever take in public school. The Court of Appeals found that the IDEA is not offended by banning testing accommodations for cognitive disabilities. As the Court of Appeals recognizes, this is apparently the first reported decision in the United States on this point (slip opinion at 17). The Court of Appeals erred in reaching its decision.

It is clear that courts "must pay great deference to the educators who develop the IEP." *Todd D. by Robert D. v. Andrews*, 933 F.2d 1576, 1581 (11th Cir. 1991). It is also clear that the IEP is to specifically indicate "any appropriate accommodations, when necessary" in state wide assessments that a disabled child will take. 20 U.S.C. § 1412(a)(17).[6] Yet, the State is mandating that the IEP, which is, of course, a creature of federal law, be ignored when the GQE is given. It is clear that state educational standards cannot override the mandate created by the IDEA. *See e.g. Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

The IDEA requires that education be "provided in conformity with the individualized education program" as well as meeting the standards of the State educational agency. 20 U.S.C. § 1401(8). The question, of course, is whether the standards of the State can overrule the IEP. The problem here is that the standard the State has adopted runs directly counter to the explicit language of the IDEA which allows modifications to be used in state wide assessments and it runs counter to the notion that the IEP should structure the child's educational experience. In the battle between State law and policy and federal law, federal law must be the winner. U.S. CONST. ART. VI. The Court of Appeals therefore erred in finding that the policy prohibiting certain accommodations and modifications on the GQE does not violate federal law.

Conclusion

It is an unpleasant reality that when educational standards are set, some persons cannot achieve the standards. However, it is not only unconstitutional, but tragic, when the bar is raised without giving students sufficient preparation to make it possible for them to achieve the standard. That is the situation here. As the result of the Court of Appeals decision, students who were on the

---

[6] Federal law also allows disabled children to be exempted from state wide assessments if the child's case conference so determines. 20 U.S.C. § 1412(a)(17); 20 U.S.C. § 1414(d)(1)(A).

verge of graduation, who would have graduated but for the GQE, have not. Without diplomas their lives have been radically altered. This Court should grant Transfer and remedy the due process and statutory violations. Judgment should be issued for the plaintiff classes.

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IN THE

INDIANA SUPREME COURT

NO.

Court of Appeals No. 49A02-0007-CV-433

MEGHAN RENE, *et al.*,	)	Appeal from the Marion Superior
	)	Court No. 12
Appellant (Plaintiffs below),	)	
	)	Cause No. 49D12-9805-CP-370
v.	)	
	)	
DR. SUELLEN REED, *et al.*,	)	
	)	Honorable Susan Macey Thompson,
Appellees (Defendants below).	)	Judge

OPPOSITION TO
PETITION TO TRANSFER

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IN THE
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NO.

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	)	Court No. 12
Appellant (Plaintiffs below),	)	
	)	Cause No. 49D12-9805-CP-370
v.	)	
	)	
DR. SUELLEN REED, *et al.*,	)	
	)	Honorable Susan Macey Thompson,
Appellees (Defendants below).	)	Judge

OPPOSITION TO
PETITION TO TRANSFER

This Court should deny transfer. As stated in Ind. Appellate Rule 57(H), the grant of transfer is a matter of judicial discretion, guided by six enumerated considerations:

(1) Conflict in Court of Appeals' decisions.
(2) Conflict with Supreme Court decisions.
(3) Conflict with federal appellate decision.
(4) Undecided question of law.
(5) Precedent in need of reconsideration.
(6) Significant departure from law or practice.

The Students' Petition to Transfer identifies only one undecided question of law: the test modifications for cognitive disabilities. In this regard, the Court of Appeals properly relied on pertinent administrative decisions and, in its published decision, provided ample guidance for anyone interested in this issue.

Moreover, the Students' Petition to Transfer does no more than argue that the Court of Appeals erred. The Students fail to assert that the Court relied on precedent that is in need of reconsideration, or that the Court's decision is a significant departure from law or practice. The Students' simply believe that the Court of Appeals got it wrong, which is not a proper basis for transfer.

A. The only undecided question of law pertains to testing modifications for cognitive disabilities.

The only undecided question of law that the Students identify is that of testing modifications for cognitive disabilities. Specifically, those Students whose IEPs provide that tests will be read aloud to them complain that the State does not permit them to have the reading comprehension portion of the GQE read to them. This issue is not proper for transfer because, although it may be a new issue of law, it does not require additional review at the Supreme Court level. The published Court of Appeals decision provides the necessary guidance as follows:

> The IEP represents "an educational plan developed specifically for the child [that] sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives. [citation omitted] The GQE, by contrast, is an assessment of the outcome of the educational plan. We therefore decline to hold that an accommodation for cognitive disabilities provided for in a students' IEP must necessarily be observed during the GQE, or that the prohibition of such an accommodation during the GQE is necessarily inconsistent with the IEP.

Slip.Op., pp.16-17.

The mere fact that the Court of Appeals relied on administrative decisions does not demand that this Court issue a separate opinion. It is not surprising there are no other published decisions on whether a disabled student may have a reading comprehension test read aloud, as such a modification would *per se* render that test invalid. The Court of Appeals correctly found

that it was not error for the trial court to determine that the State need not honor such accommodations if they affect the validity of the exam. Slip.Op., p.18.

B. The Students improperly ask this Court to reweigh the evidence that they were exposed to curriculum that covered subjects tested on the GQE.

The Students seek to have this Court revisit the findings of fact made by the trial court and upheld by the Court of Appeals. The standard of review of trial court findings is whether the findings are clearly erroneous. In making such a determination, the appellate court considers only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and neither reweighs evidence nor assesses witness credibility. Ind. Rules of Procedure, Trial Rule 52(A). *Accord, In re: R.P.D. ex rel. Dick,* 708 N.E.2d 916, 919 (Ind.Ct.App. 1999). "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Yanoff v. Muncy,* 688 N.E.2d 1259, 1262 (Ind.1997).

The Court of Appeals applied the appropriate standard of review to the trial court's findings of fact and correctly upheld the finding that the Students were exposed to the curriculum tested on the GQE because it was not clearly erroneous. Slip Op., p. 11. The appellate court affirmed the lower court's finding that state law requires remedial assistance to all students who do not meet the academic standards required to pass the GQE and that, given the "multiple remediation opportunities mandated by state law for students who do not pass the GQE," it was implausible that the Students "were not exposed throughout their high school career to the subjects tested on the GQE." FOF 7, R. 1375; Slip Op., p.13.

The record is replete with facts to support this finding and the appellate court's affirmance thereof. The record shows and the trial court found that the GQE is administered initially in the fall to allow time for additional help during the school year for each student who fails to pass the GQE. FOF 6, R. 1374, citing Def. Inj. Doc. 13, ISTEP Parent and Student Guide

at 7. Based on the record, the trial court also found that schools have an obligation to hold a conference with the parents of every student who does not pass the GQE to discuss a remediation plan for that student based on the student's test results. *Id.*, citing Def. Inj.Doc. 6, Zaring Dep. at 29, R. 500. *See also* Ind. Code § 20-10.1-16-7(e). As the record demonstrates and the trial court concluded, the State funds remediation with grants ranging from $20 to $160 per pupil. *Id.* at 1375, citing Def. Inj.Doc. 15, LSA Report at 6, R. 884.

The record shows that each school is required to demonstrate the alignment of its curriculum with the state educational proficiencies through the Performance-Based Accreditation process. *See* Def. Inj. Doc. 6, Zaring Dep. at 27, R. 498. The record also contains the Achieve Report, an outside study by an independent, bipartisan organization, to further demonstrate that the GQE was aligned to the state standards. FOF 8, R. at 1376-1377, citing Def. Inj. Doc. 20, Achieve Report at 3, R. 1245.

Moreover, the record also shows that Indiana at all times relevant had one curriculum for all students. As the trial court found, Indiana has a policy of mainstreaming disabled students with the general student population. FOF 1, R. 1368. Indiana law has at all relevant times provided that "children with disabilities shall receive credit for school work accomplished on the same basis as normal children who do similar work." Ind. Code § 20-1-6-3(g). *Id.*

Thus, the record clearly supports the trial court's finding with regard to the Students' exposure to the subjects tested on the GQE and the Court of Appeal's determination that the findings is not clearly erroneous. The appellate court's ruling on this issue provides no basis for transfer.

C. The Students ignore the *Ambach* decision, which holds that three-years notice of an exam requirement satisfies due process.

The Students acknowledge that they had at least three years notice of the GQE requirement. Pet. for Trans., p. 6. But they ignore the logic and persuasive reasoning of *Board of Educ. of Northport-East Northport Union Free Sch. Dist. v. Ambach*, 90 A.D.227, 458 N.Y.S.2d 680 (N.Y. App.Div.1982), *aff'd* 60 N.Y.2d 758, 469 N.Y.S.2d 669, 547 N.E.2d 775 (N.Y. 1983), *cert denied* 465 U.S. 1101 (1984), which is that "the three-school-year notice . . . was not of such a brief duration as to prevent school districts from programming the IEPs of [remedially handicapped children] to enable them to pass the basic competency tests required for diploma graduation." 90 A.D.2d at 233. Under the reasoning of *Ambach* and other cases discussed in the State's appellate brief, the Court of Appeals correctly found that the trial court did not err in determining that the State provided adequate notice to the Students that they would be subject to the GQE requirement. Slip.Op., p.18.

D. The Students ignore the holding of *Brookhart* regarding remediation as an effective remedy.

In *Brookhart v. Illinois State Board of Education,* 697 F.2d 179 (7th Cir. 1983), the Seventh Circuit observed that "[s]ubstantively, the due process right is not a right to a diploma, but rather a right to adequate notice in order to prepare for the new requirement." 697 F.2d at 188. The Court, therefore, held that the proper remedy for the inadequate notice was not receipt of a diploma but rather a requirement that the school district provide "free, remedial, special education classes to ensure exposure to the material tested on the test and a reasonable opportunity for plaintiffs to learn that material." *Id.* Here, the Court of Appeals correctly found that the trial court did not err in determining that the remediation offered by the State was an adequate remedy for any due process violation. Slip.Op., p.18.

The Students wanted an order enjoining the State from enforcing the GQE until it is a fair test of what disabled students have been taught. But the two cases on which the Students rely [*Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981) and *Anderson v. Banks*, 520 F.Supp. 472 (S.D.Ga. 1981), *app.dnd* 730 F.2d 644 (11th Cir. 1984)] are inapposite because they are not IDEA cases. The remediation remedy simply wasn't available in those cases. As argued above, the Court of Appeals correctly upheld the trial court's determination that the GQE is a fair test of what disabled students are taught.

E. The Students ignore the statutory waiver provision.

The Students continue to ignore the State's statutory waiver process as an alternative means to a diploma. The statutory waiver vests in the local case conference committee the power to recommend and in the local school corporation the power to issue a diploma to a student who does not pass the GQE. Thus, the Students' claim that a student must pass the GQE to receive a diploma is erroneous. Specifically, any student who qualifies for a waiver cannot complain of being denied a diploma solely because of the GQE requirement.

Conclusion

The Court should deny transfer.

Respectfully submitted,

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IN THE
INDIANA SUPREME COURT

No. _____

(Court of Appeals No. 49A02-0007-CV-433)

MEGHAN RENE, *et al.*,	)	
	)	APPEAL FROM THE MARION
Appellants (Plaintiffs Below),	)	SUPERIOR COURT, ROOM NO. 12
	)	
v.	)	Cause No. 49D12-9805-CP-370
	)	
DR. SUELLEN REED, *et al.*,	)	HONORABLE SUSAN MACEY
	)	THOMPSON, JUDGE
Appellee (Defendant Below).	)	

REPLY BRIEF IN SUPPORT OF PETITION TO TRANSFER

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ARGUMENT

I. Introduction

The decision of the Court of Appeals erroneously established two new extremely important and far-reaching questions of law. First, the Court held that due process was not violated despite the uncontested evidence that in May of 1999 almost 50% of students with learning disabilities had not had sufficient curriculum preparation to take the graduation qualifying examination ("GQE") and despite the uncontested evidence that non-disabled students were required by Indiana law to have 13 years of preparation to learn the building block material necessary to master the proficiencies tested on the GQE and disabled students were required to have only 3 years. Secondly, the Court held that despite the fact that federal law specifically contemplates that there be appropriate accommodations in state wide assessments, 20 U.S.C. § 1412(a)(17), it was not a violation of federal law for the State to deny to disabled students testing accommodations on the GQE even though every other single test ever taken by the student was taken with those accommodations. As a result of this, in the class of 2000 alone, more than 1,100 children did not graduate. (R. 336). This is obviously "a case of great public importance that has not been, but should be, decided by the Supreme Court." Rule 56(H)(4), Indiana Rules of Appellate Procedure.

II. The Court of Appeals decision is erroneous as a matter of law and the students are not asking that any evidence be reweighed

It is undisputed that the trial court found that once students flunked the GQE in their sophomore years they were given remediation opportunities. (R. 1375). However, it is also undisputed that prior to the advent of the GQE there was absolutely no legal requirement that disabled students be taught the building block material necessary to ultimately obtain mastery of the material tested on the GQE. This, despite the fact that Indiana law required that non-disabled students begin this realignment process in 1987. The failure to realign the disabled students'

curriculum was so profound and so pervasive that the Legislative Services Agency found in May of 1999, almost two school years after the GQE was first given in 1998, that only "51% of the 10th and 11th grade students with learning disabilities who took the GQE had sufficient curriculum preparation." (R. 911). Even as this case went to hearing before the trial court in the late spring of 2000, special education directors indicated that they had still not realigned their curriculum to teach what was tested on the GQE. (R. 106, 212).

Thus, regardless of any remediation offered after the test was flunked, it is uncontested, that many of the students were never exposed to a curriculum which was geared to teach them the building block material which they would need to master the test. It is also uncontested that non-disabled students were exposed to this material from the first day that they attended kindergarten. Non-disabled students were given an entire academic career of careful grooming to assure that they would have every opportunity to pass the GQE. Disabled students were given 3 years and during this time they were not even assured of being taught a curriculum which had been realigned to teach what was tested on the GQE. There is no need to reweigh any evidence to recognize that this is a stark and obvious due process violation. *Brookhart v. Illinois State Board of Education*, 697 F.2d 179 (7th Cir. 1983); *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981); *Crump v. Gilmer Independent School District*, 797 F.Supp. 552 (E.D.Tex. 1992).

The State argues that the three years notice that disabled students were given from the time that the test was first given in 1997 until the graduation of the class of 2000 was sufficient, citing *Board of Education of Northport-East Northport Union Free School District v. Ambach*, 458 N.Y.S.2d 680 (App.Div. 1982), *aff'd*, 457 N.E.2d 775 (N.Y. 1983), *cert. den.*, 465 U.S. 1101 (1984). It is true that in *Ambach* the court held that three years prior notice was constitutionally adequate procedural due process. But the court in *Ambach* did not face the situation here where the students'

curriculum was not properly aligned throughout their education careers so as to actually expose the students to the information necessary, ultimately, to be able to pass the GQE. No matter how much remediation a student has, if she or he has not been exposed to and learned the basic building block material, passing the GQE will be an unattainable goal.

For this reason, the opportunity given for remediation is simply not an effective remedy for the due process violation. If the GQE is not a fair test of what has been taught to the students throughout their educational lifetimes, the proper remedy is to prohibit the test from being used until it is a fair test of what the students have been taught. *Debra P.*, 644 F.2d at 408. Nor is the fact that a student can receive a waiver of the GQE requirement if the student can otherwise demonstrate that he or she has mastered the proficiencies tested on the examination a remedy for the due process violation. The disabled students have not been given an adequate opportunity to master the proficiencies. To them, the waiver is illusory.

For the reasons outlined in the Petition to Transfer, the Court of Appeals determination, in the first reported decision in the United States, that the failure of the State to honor certain accommodations in the GQE is lawful, is also erroneous and must be reviewed by this Court.

III. Conclusion

The GQE, and its attendant due process and statutory violations, has worked great hardship and great injustice on a large number of disabled students who we should be lauding rather than punishing. Transfer should be granted to remedy this.

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Cause Number
49A02-0007-CV-00433
Lower Court Number:
49D129805CP730

RENE, MEGHAN -V- DR. SUELLEN REED

You are hereby notified that the SUPREME COURT has on this day 1/31/02

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR, EXCEPT SULLIVAN, J., WHO VOTES TO GRANT TRANSFER.

MS

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WITNESS my name and the seal of said Court.
this 31ST day of JANUARY, 2002

Brian Bishop

Clerk Supreme Court, Court of Appeals and Tax Court

FOR PUBLICATION

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IN THE COURT OF APPEALS OF INDIANA

MEGHAN RENE, by her parents and next Friends, MICHAEL and ROBIN RENE, et al.,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 49A02-0007-CV-433
DR. SUELLEN REED, in her official capacity As Indiana State Superintendent of Public Instruction, et. al.,	)	
Appellees-Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Susan Macey Thompson, Judge
Cause No. 49D12-9805-CP-730

June 20, 2001

OPINION – FOR PUBLICATION

MATTINGLY-MAY, Judge

Meghan Rene and certain other students with disabilities ("the Students") who were or are required to pass the Indiana graduation qualifying examination ("the GQE")[1] brought a class action against Dr. Suellen Reed as Indiana Superintendent of Public Instruction ("the State"). They sought declaratory and injunctive relief, alleging the State violated their due process rights by imposing the GQE as a condition of high school graduation because the State had not previously required disabled students to meet the standards the State had implemented to prepare students for the GQE. Therefore, the Students say, it did not necessarily expose them to some of the material tested on the GQE. The Students also assert the State violated the Individuals with Disabilities Education Act (IDEA) because they were denied certain test-taking adaptations and modifications required for them pursuant to the IDEA. The trial court entered judgment[2] for the State, and we affirm.[3]

FACTS

We summarized the evolution of this case in *Rene ex rel. Rene v. Reed*, 726 N.E.2d 808, 812-15 (Ind. Ct. App. 2000), (hereinafter *Reed I*) where we reversed the trial court's order denying certification to one of the classes and redefining the other:

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[1] The Test is also known as the Indiana Statewide Testing for Education Progress test, or "ISTEP+."

[2] Following a hearing on the Students' motion for preliminary injunction, the trial court entered, *sua sponte*, findings of fact and conclusions of law. It also entered an order denying injunctive relief. The parties agreed that a final judgment should be entered on the existing record, and the court entered final judgment on the basis of the findings and conclusions stated in its order denying injunctive relief. While the trial court incorporated into the final judgment its preliminary injunction findings, there was no separate request for findings on final judgment.

[3] We heard oral argument at Columbus North High School on April 12, 2001. We gratefully acknowledge the hospitality of the School and the Bartholomew County Bar Association, and we commend counsel for their capable advocacy.

On May 21, 1998, the Students filed their class action Complaint seeking injunctive and declaratory relief. The Complaint, filed by their parents on the Students' behalf, set forth claims under 42 U.S.C. § 1983 and the Individuals with Disabilities Education Act, 20 U.S.C. § 1401 ("IDEA"). The Students, as defined by proposed Class A, claim that the Appellee/Defendant, Dr. Suellen Reed (Dr. Reed), in her official capacity as Indiana State Superintendent of Public Instruction, violated their due process rights under the United States Constitution and the Indiana Constitution by requiring them to take and pass the Graduation Qualifying Examination ("GQE") when they had previously been exempted from standardized testing and/or had not been taught the subject matter on the tests. The Students, as defined by proposed Class B, claim that Dr. Reed violated their rights under the IDEA by requiring them to take the GQE without the testing accommodations and adaptations required by the Students' case conferences and individualized education programs.

In Indiana, students participate in the Indiana Statewide Testing for Educational Progress (ISTEP) testing program in the third, sixth, eighth and tenth grades. Ind. Code § 20-10.1-16-8. This test measures achievement in mathematics and language arts. Ind. Code § 20-10.1-16-7. The GQE is a portion of the tenth grade ISTEP examination. Subject to two exceptions, all Indiana high school students who wish to receive a high school diploma must take and pass the GQE. Ind. Code § 20-10.1-16-13. This includes students with disabilities. *Id.*

The Students are four Indiana high-school students, who were in the 10th grade at the time the Complaint was filed. The Students belong to first class of Indiana students, the class of 1999-2000, who are required to pass the GQE as a prerequisite to receiving a high school diploma.[4]

As a condition of the State receiving federal financial assistance, the IDEA requires that students with disabilities must receive a public education which is free and appropriate given their specific needs. 20 U.S.C. § 1400(d); 20 U.S.C. § 1412(a)(1). Indiana receives money under the IDEA and is therefore bound by the federal requirements. Ind. Code § 20-1-6-1. The federal requirement that a student receive a free and appropriate education is ensured by means of an individualized education program ("IEP") which is prepared at least annually in a case conference which is attended by the students with disabilities' regular education teachers, special education teachers, parents and others who have knowledge and special expertise. 20 U.S.C. § 1414(d); Ind. Code § 20-1-6-1(5). The IEP contains the outline of the student's education, including the services to be provided and modifications to the general education program,

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[4] The only remaining named plaintiff of the original four is Meghan Rene. One of the plaintiffs dropped out of school; one passed the GQE; and one has been granted a waiver to receive a diploma.

including modifications to any statewide assessments to be given to special education students. 20 U.S.C. § 1414(d).

Prior to the change in the state statute requiring that students pass the GQE, case conference could indicate that a student with disabilities was excused from taking the GQE or other standardized testing, while still on the diploma track. The case conference could also determine that the tests for these diploma bound students would be taken diagnostically, which meant that they were not given under normal testing conditions, and if the student failed, there would be no adverse consequences such as remediation or retention. Prior to the GQE, students with disabilities on the diploma track received a high school diploma if they satisfied the requirements of their IEPs and the general state curriculum requirements, regardless of whether they took the standardized tests. Furthermore, prior to the GQE, there was not a requirement that in order to graduate, a student master the skills that are now tested by the GQE examination. The Students allege that as a result, many students with disabilities who were on a diploma track were not taught the information now tested on the GQE. Indeed, the State has acknowledged that there was no requirement that, prior to the GQE, students with disabilities be taught the skills which are now tested on the graduation examination.

[Meghan Rene] attends Ben Davis High School in Indianapolis, Indiana, and has received special education since the first grade. Prior to the GQE requirement, Meghan had always been excused from standardized testing. Meghan's IEP provided that she was in the diploma program and if she completed all her course work and complied with her IEP, she would receive a diploma. Meghan's IEP further provided that she be excused from standardized testing and also indicated that all tests were to be read to her. Meghan was first informed that she had to take the GQE in the fall of 1997. Meghan first took the exam in the fall of 1997 and the examination was not read to her. Also, Meghan's IEP provided that she be allowed to use a calculator during testing. This accommodation was also disallowed when she took the GQE. Meghan failed the exam, and as of February 1999, had yet to pass the GQE.

* * *

None of the representative plaintiffs are in the Core 40 curriculum program which would exempt them from the GQE. Further, all of the Students allege that they were not given sufficient notice that they would be required to pass the GQE and were not given the opportunity to adjust their curriculum in order to take courses that would specifically prepare them for the GQE. Additionally, the Students assert that they would not qualify under the waiver provision of Ind. Code § 20-10.1-16-13(e) because they

have not obtained the necessary proficiencies in the tested areas to allow their teachers to so certify.

(footnote two supplied; record citations omitted).

STANDARD OF REVIEW

Because the trial court, pursuant to the agreement of the parties, entered final judgment on the basis of the findings and conclusions it entered *sua sponte* in its order denying injunctive relief, we will consider the findings to be made voluntarily and will treat the decision as a general judgment with respect to issues not covered by the findings. Under that standard, the specific findings control only with respect to the issues they cover, and the general judgment controls as to the issues upon which the court has not found. *Catellier v. Depco, Inc.*, 696 N.E.2d 75, 77 (Ind. Ct. App. 1998). We may not reverse the trial court's findings unless they are clearly erroneous. *Id.* The general judgment will be affirmed if it can be sustained upon any legal theory by the evidence introduced at trial. *Id.* In our review, we will consider only the evidence that is most favorable to the trial court's judgment and will not weigh the evidence or judge the credibility of witnesses. *Id.*

DUE PROCESS

The trial court properly found, and the State does not explicitly disagree, that the Students have a property interest protected by due process in the award of a diploma if all graduation requirements are met. If the state chooses to provide a public education system, it "is constrained to recognize a student's legitimate entitlement to a public education as a property interest which may be protected by the Due Process Clause."

Debra P. v. Turlington, 644 F.2d 397, 403 (5th Cir. 1981), *quoting Goss v. Lopez*, 419 U.S. 565, 574 (1975). In *Debra P.*, students challenged a standardized test required by the State of Florida as a condition for receipt of a high school diploma. The court there noted that the exam might have covered matters not taught through the curriculum and it held the state could not constitutionally deprive its public school students of a diploma on that basis. 644 F.2d at 404.

While the State implicitly concedes there are due process implications in the case before us, it does assert as a threshold matter that there was no due process violation because "[t]he Students wrongly claim they had a legitimate expectation to receive a regular high school diploma because their case conference committees checked a box on their IEPs indicating that they were on a 'diploma track'" (Br. of Defendant-Appellant at 24) (hereinafter "State's Br.").[5]

The Students do not argue a property interest had arisen because someone "checked a box on their IEPs;" rather, they rely on *Debra P.*, where the Seventh Circuit found a property right arising from the establishment of a system of free public education and from mandatory attendance laws:

> From the students' point of view, the expectation is that if a student attends school during those required years, and indeed more, and if he takes and passes the required courses, he will receive a diploma. This is a property

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[5] It is not apparent from the Students' brief that they are making any such "claim," wrongly or otherwise. The State supports this characterization of the Students' argument by noting that disabled students are to receive a diploma which is not differentiated from that received by non-disabled students, but only if the minimum credit requirements are met. *See* 511 IAC 7-13-3(d).

> interest as that term is used constitutionally. . . . This expectation can be viewed as a state-created "understanding" that secures certain benefits and that supports claims of entitlement to those benefits.

644 F.2d at 404.

Although the trial court acknowledged that due process was implicated by the GQE requirement, it found the imposition of the GQE as a condition to the grant of a diploma did not violate the Students' due process rights because the three years' notice the Students were given of the GQE requirement was adequate and because the Students' remedy for the schools' alleged failure to teach the subjects required by the GQE was "continued education and remediation and not the award of a high school diploma." (R. at 1382.)

1. The Nature of the Due Process Implications of the GQE Requirement

We recognized in *Reed I* that due process is violated when a "graduation exam is 'fundamentally unfair in that it may have covered matters not taught in the schools of the state,'" 726 N.E.2d at 822 n.8, quoting *Debra P.*, 644 F.2d at 404. We further noted "due process protections require that handicapped students be given sufficient notice of a minimal competency exam in order for them to prepare adequately to satisfy the new requirement." *Id.*, citing *Brookhart v. Illinois State Bd. of Educ.*, 697 F.2d 179, 186-87 (7th Cir. 1983).

2. The Asserted Due Process Violations

The Students allege the implementation of the GQE denied them due process because 1) the Students were not exposed during their schooling to some of the material tested on the GQE, and 2) they had inadequate notice of the requirement and inadequate

time to prepare for the GQE.[6] They further assert that additional remediation is not an adequate remedy for the due process violation. Rather, they contend that the State should be enjoined from enforcing the GQE requirement until the GQE represents a fair test of what disabled students have been taught.

A. Notice of the GQE Requirement

In *Brookhart*, handicapped students challenged a school district decision in the spring of 1978 to require that all students eligible to graduate in the spring of 1980 pass a "minimal competency test" ("M.C.T") as a condition of the receipt of a diploma. The district publicized the new requirement with announcements in the mass media, distribution of circulars in schools, and individual mailings to some parents. In *Brookhart*, as here, the students did not "contest the factual basis underlying the loss of a liberty interest; in fact, they admit that they did not pass the M.C.T. Rather, they demanded procedures that would provide sufficient notice of the M.C.T. to enable them to prepare adequately to satisfy the new requirement." 697 F.2d at 185.

The *Brookhart* court determined the notice was inadequate despite the absence of evidence any student was unaware of the requirement. *Id.* at 182. There was evidence before the district court that the disabled students' IEPs did not expose them to up to 90

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[6] The State characterizes the Students' argument as "ask[ing] this Court to order the State to provide them with credentials certifying their competencies, despite their inability to pass an examination that tests them on ninth-grade standards and despite their local school corporations' inability to certify that they have acquired these skills." (State's Br. at 13.)

In fact, the Students nowhere argue they have such an entitlement to a diploma or that the State should be "ordered" to award diplomas to students who cannot pass the GQE. Instead, they argue the GQE requirement was improperly imposed on them without adequate notice or preparation and without allowance for testing accommodations called for in their IEPs.

per cent of the material tested on the M.C.T., and the students had only one to one-and-one-half years to prepare for the test:

> [t]he plaintiffs' programs of instruction were not developed to meet the goal of passing the M.C.T., but were instead geared to address individual educational needs. Since plaintiffs and their parents knew of the M.C.T. requirements only one to one and a half years prior to the students' anticipated graduation, the M.C.T. objectives could not have been specifically incorporated into the IEPs over a period of years. If they were incorporated at all, it could only have been during the most recent year and a half. As the Superintendent found, "in an educational system that assumes special education students learn at a slower pace than regular division students," a year and a half to prepare for the M.C.T is insufficient. Thus the length of notice, rather than a deliberate decision not to instruct plaintiffs because of their incapacity to master the material, explains the overwhelming lack of exposure to M.C.T. goals and objectives.

Id. at 187.

The *Brookhart* court declined to define "adequate notice" in terms of a specific number of years, but it noted the requirement would be satisfied if the school district 1) ensured that the students were sufficiently exposed to most of the material that appears on the test, or 2) produced evidence of "a reasonable and well-informed decision by the parents and teachers involved that a particular high school student will be better off concentrating on educational objectives other than preparation for the M.C.T." *Id.* at 187-88.

There was evidence in the case before us to support the trial court's determination that the students had adequate notice of the GQE requirement. The State notes the school districts had at least five years' notice of the GQE requirement, and the Students and their parents had at least three. The State cites *Board of Educ. of Northport-East Northport Union Free Sch. Dist. v. Ambach*, 458 N.Y.S.2d 680, 688 (N.Y. App. Div. 1982), *aff'd*

457 N.E.2d 775 (N.Y. 1983) as authority for its premise that three years' notice is sufficient. In a portion of its decision the *Ambach* court addressed "remedially," rather than "functionally" handicapped children. It held "the three-school-year notice . . . was not of such a brief duration as to prevent school districts from programming the IEPs of [remedially handicapped children] to enable them to pass the basic competency tests required for diploma graduation."

Debra P. and *Anderson v. Banks*, 520 F. Supp. 472 (S.D. Ga. 1981) also support the proposition that three years is sufficient notice.[7] In *Anderson*, two years' notice of a requirement that graduating students would need to demonstrate performance at a ninth-grade level was adequate where, as here, the test could be retaken and remediation was provided. In *Debra P.*, one year of notice was found insufficient where the state had not submitted evidence that the test covered material required to be taught in the classroom. On remand, the injunction was lifted after the state provided such evidence. 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd* 730 F.2d 1405 (11th Cir. 1984). We cannot say the trial court erred to the extent it determined the State provided adequate notice that the Students would be subject to the GQE requirement.

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[7] We note that both of those cases involved allegations by African-American students that past segregation had resulted in their higher failure rate on standardized tests. The students in those cases were not characterized as "disabled" in the sense that they were unable to learn at the same pace as other students. Therefore, the length of time found to constitute adequate notice in those decisions is not necessarily adequate to permit preparation by disabled students such as those in the case before us.

B. Exposure to the Curriculum

The Students assert non-disabled students had ten years to prepare for the GQE requirement while the disabled students, who do not learn at a normal rate, had only three. They note that the ISTEP program, without the GQE requirement, was added in 1987, and the State Board of Education was at that time directed to begin adopting educational proficiencies and achievement standards for grades one through eight. However, disabled students whose IEPs did not include regular instruction in mathematics and language arts were exempted from the proficiency standards in that such decisions regarding disabled students were to be made not pursuant to ISTEP but rather pursuant to the disabled students' case conferences and IEPs.

In 1990, the ISTEP statute was amended to apply to high school students, and the disabled students were again exempted. As a result, they assert, the curriculum for non-disabled students has been adjusted and aligned to the material tested on the ISTEP since 1987. The GQE requirement was added by legislation in 1995, with the testing requirement imposed for the first time on the class of 2000. Disabled students are not exempted from the GQE, regardless of any contrary indications in the case conferences or IEPs.[8] The Students point to record evidence that it was not until 1997 that the State's Special Education Director notified school administrators the GQE requirement would

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[8] The GQE requirement may be waived for a disabled student when the case conference determines the child is eligible to graduate after the student's teacher makes a written recommendation, in which the principal concurs, to the case conference committee. The recommendation must be supported by documentation that the student has attained the GQE academic standards in each GQE subject area where the student did not pass the GQE. The student must also retake the examination as required by his or her IEP, must complete remediation, must achieve a "C" average, must maintain 95% attendance, and must satisfy all other graduation requirements.

apply to disabled students, and that parents of the disabled students did not find out about the requirement until just before the first test was given in 1997.

The trial court found the Students had been exposed to the curriculum tested on the GQE, and we cannot characterize that finding as clearly erroneous. In its findings of fact, the court noted that state law requires remedial assistance be provided to all students who do not meet the academic standards required to pass the GQE, and stated "Given the multiple remediation opportunities mandated by state law for students who take but do not pass the GQE, the Court finds it implausible that the Plaintiff class was not exposed throughout their high school career to the subjects tested on the GQE." (R. at 1375.)

The Students correctly note there was evidence presented that in order to learn the material tested on the GQE, students must have the appropriate base knowledge from earlier courses and from building blocks that were in place in elementary school. They note that disabled students, by definition, learn at a slower pace than other students. But, they assert, there was evidence that even after the imposition of the GQE requirement, the curriculum for a significant number of disabled students had not been "realigned to the proficiencies tested on the examination." (Br. of Appellants at 32) (hereinafter "Students' Br.").

While the State notes the school systems were required by statute and regulation to align their curriculum with the state standards, at least as of 1996, it does not directly argue the disabled students' curriculum addressed the GQE requirements in advance of the imposition of the GQE requirement on the Students. Rather, it asserts, the Students did not submit any evidence the GQE is not aligned with "the curriculum required by

state law to be offered at their schools and made available to them through state mandate, *given the multiple opportunities provided them to take the exam and the targeted remediation the State has made available at no cost to them.*" (State's Br. at 23) (emphasis supplied). Though the record suggests the Students would have benefited from earlier adjustment of their curriculum in order to prepare them for the GQE requirement, we cannot characterize as clearly erroneous the trial court's determination that the Students were exposed during their high school careers to the subjects tested on the GQE.

C. Adequacy of Remediation Remedy

The trial court found that if the school systems had failed to teach the Students the subjects tested on the GQE despite the Students' ability to meet the GQE standards, "the remedy is not that the State be required to hand these Plaintiffs a diploma." (R. at 1381.) Rather, it concluded, citing *Brookhart*, that the remedy is to offer the students additional remediation and opportunities to acquire the necessary skills.

The *Brookhart* court did state that "in theory, the proper remedy for a violation of this kind is to require [the school district] to provide free, remedial special education classes to ensure exposure to the material tested . . . ." 697 F.2d at 188.[9]

The Students note that the *Brookhart* case involved only 14 plaintiffs, and they point to *Anderson*, 520 F. Supp. at 512 as authority for their argument that where there is

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[9] The *Brookhart* court determined it would, in the case before it, "be unrealistic to assume that eleven of these plaintiffs would be able to return to school without undue hardship," and accordingly held the school district could not require the students to pass the standardized test as a prerequisite for a diploma. *Id.* The Students in the case before us direct us to no evidence of such undue hardship.

a "systematic failure of due process" (Students' Br. at 35) involving a large number of students, the proper remedy is to enjoin the State from requiring the GQE until such time as it "is no longer irrational to impose the requirement on the class." (Students' Br. at 35.) They argue that until the GQE requirement has been in effect for the entire educational career of a student, the case conferences should be responsible for making the determination whether it is appropriate for a disabled student to take the GQE in order to graduate.

In *Anderson*, the court ordered the schools to award diplomas to all students who would have received them but for the graduation test policy. It went on to hold that "[n]o exit exam policy may be utilized until it is demonstrated that the test used is a fair test of what is taught." 520 F. Supp. at 512. Similarly, in *Debra P.*, the court held the state could not deprive its high school seniors of the benefits of a high school diploma until it demonstrated its version of the GQE was a fair test of what was taught in its classrooms. 644 F.2d at 408. There, the exam had had a disproportionate impact on black students due to unequal educational opportunities several years before the test was administered.

In light of the evidence before the trial court that the Students had between three and five years' notice they would be subject to the GQE requirement, we cannot say the trial court erred to the extent it determined the remediation offered by the State was an adequate remedy for any due process violation arising from the test requirement.

INDIVIDUALS WITH DISABILITIES EDUCATION ACT[10]

The trial court made no findings of fact with regard to the students in Class B, who alleged a violation of the IDEA in the form of the State's failure to honor certain modifications and accommodations in the test-taking process. As its only conclusion of law on that issue, the trial court stated the Students had failed to "cite supporting law for their position that the State's policies violate IDEA," (R. at 1382), and therefore they had not established a *prima facie* case on that issue.

We note initially that the IDEA does not require specific results, but instead it mandates only that disabled students have access to specialized and individualized educational services. Therefore, denial of a diploma to handicapped children who cannot achieve the educational level necessary to pass a standardized graduation exam is not a denial of the "free appropriate public education" the IDEA requires. *Brookhart*, 697 N.E.2d at 183 (addressing the IDEA predecessor statute). Further, the imposition of such a standardized exam does not violate the IDEA where, as in the case before us, the exam is not the sole criterion for graduation. *Id.* "Congress' desire to provide specialized educational services . . . cannot be read as imposing any particular substantive educational standard upon the states." *Board of Educ. of Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 200 (1982).

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[10] 20 U.S.C. §§ 1401 *et seq.* Under Ind. Code § 20-1-6-4, the State "accepts all of the provisions and benefits of all laws enacted by the Congress of the United States which provide for aid to children with disabilities . . . and the Indiana state board of education shall comply with all the requirements of federal law concerning any such federal funds relating to such special educational activities . . . ."

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The IDEA requires participating states to offer special education and related services in conformity with the individualized education program (IEP) provided for in 20 U.S.C. 1414(d). The IEPs of the members of Class B state that the class members are on the diploma track but are to be excused from standardized testing or are to have certain accommodations during testing. While the definition of "free appropriate public education" mandated by the IDEA includes special education that meets the standards of the State educational agency, 20 U.S.C. § 1401(8)(B), *Rowley* notes that it "must also comport with the child's IEP." 458 U.S. at 203; 20 U.S.C. § 1401(8)(D).

Because the State is requiring all the members of Class B to take and pass the GQE without certain adaptations or accommodations, the Students assert the IDEA is violated. "[S]tate procedures which more stringently protect the rights of the handicapped and their parents are consistent with the [IDEA's predecessor statute] and thus enforceable." *Antkowiak by Antkowiak v. Ambach*, 838 F.2d 635, 641 (2d Cir. 1988). However, "those [procedures] that merely add additional steps not contemplated in the scheme of the Act are not enforceable." *Id.* The State, the Students say, accordingly cannot choose to honor some, but not other, of the modifications and adaptations called for in the IEP and cannot require a disabled student to take the GQE if he or she is properly exempted by the case conference.

We cannot say the trial court erred to the extent it determined the State need not honor certain accommodations called for in the Students' IEPs where those accommodations would affect the validity of the test results. The court had evidence before it that the State does permit a number of accommodations typically called for in

IEPs. However, the State does not permit accommodations for "cognitive disabilities" that can "significantly affect the meaning and interpretation of the test score." (State's Br. at 44.)

For example, the State permits accommodations such as oral or sign language responses to test questions, questions in Braille, special lighting or furniture, enlarged answer sheets, and individual or small group testing. By contrast, it prohibits accommodations in the form of reading to the student test questions that are meant to measure reading comprehension, allowing unlimited time to complete test sections, allowing the student to respond to questions in a language other than English, and using language in the directions or in certain test questions that is reduced in complexity.

Neither the Students nor the State have directed us to decisions that directly address whether the IDEA is violated by prohibiting on a standardized graduation exam accommodations for "cognitive disabilities" that are provided for in a student's IEP. However, a number of administrative decisions have addressed one such accommodation--that of providing the services of a reader for a reading comprehension test. In those decisions, Office of Civil Rights hearing officers have found that states could properly require students to take a reading comprehension test without providing the services of a reader. For example, in *Mobile County Bd. of Educ.* 26 IDELR 695

(1997), the hearing officer decided the State could properly deny an accommodation in the form of a reader on the Alabama "exit exam."[11]

The IEP represents "an educational plan developed specifically for the child [that] sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." *Board of Educ. of Oak Park & River Forest High School Dist. No. 200 v. Illinois State Bd. of Educ.*, 10 F. Supp. 2d 971, 975-76 (N.D. Ill. 1998). The GQE, by contrast, is an assessment of the outcome of that educational plan. We therefore decline to hold that an accommodation for cognitive disabilities provided for in a student's IEP must necessarily be observed during the GQE, or that the prohibition of such an accommodation during the GQE is necessarily inconsistent with the IEP. We cannot say the trial court erred when it determined the prohibition of certain accommodations did not violate the IDEA.

CONCLUSION

While the Students have an interest protected by due process in fair implementation of the GQE requirement, we cannot say the trial court erred when it found the Students were exposed during their schooling to the subjects tested on the GQE, that they had adequate notice of that graduation requirement, and that the remediation and additional opportunities to take the GQE were an adequate remedy if due process was violated. The trial court further did not err to the extent it found the State's

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[11] That decision was based in part on the fact the student had never before been provided that accommodation on any test, and there was no evidence the accommodation had ever been successful with that student.

refusal to allow certain test-taking accommodations did not violate the IDEA. Accordingly, we affirm.

SHARPNACK, C.J., and BAILEY, J., concur.

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